United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL WITH PROOF OF SERVICE

76-7476

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellees,

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

-and-

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF, as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF OF ADDITIONAL DEFENDANT ON COUNTERCLAIMS-APPELLANT-CROSS-APPELLEE CHARLES SLOANE

ELAINE PLATT
Attorney for Additional Defendant on Counterclaims-Appellant-Cross-Appellee Charles Aloane
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(6076-1)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley, Plaintiff - Appellant Cross-Appellee,	Docket No. 74-7476
- against -	
CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE, Defendants - Appellees Cross-Appellants, NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, et al., Additional Defendants on Counterclaims - Appellants - Cross-Appellees.	Related Appeals: 76-7486 76-7488 76-7489 76-7494 76-7495 76-7499 76-7500

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT CHARLES SLOANE

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (con't)

STATEMENT OF THE COURT'S JURISDICTION

The Court's jurisdiction is based upon 28 U.S.C. §1291 and is predicated upon the interlocutory order of Judge Ward[1/]; the final determination of Judge Richard Owen sitting without a jury[2/] in the Southern District of New York whose opinion and order dated July 7, 1976 found the Appellant Sloane to be liable for certain claims, jointly and severally with the Plaintiff and other Additional Defendants on Counterclaims to the Defendants; a judgment on the said opinion and order as against the Plaintiff and each Additional Defendant on the Counterclaims filed September 1, 1976 as corrected on November 17, 1976. (A-PL-Vol.II-571) The certified record of these proceedings has been filed with this Court.

1/ Newburger, Loeb & Co., Inc. v. Gross, 365 F. Supp. 1364 (S.D.N.Y. 1973) (A-PL-Vol.II-444)

2/ The trial began with a six-person jury and by consent of all parties the jury was withdrawn after 3 weeks of trial.

A. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether based on the facts presented at the trial of the issues, Charles Sloane knowingly entered into a conspiracy to violate Section 98 of the New York Partnership Law.

B. STATEMENT OF THE CASE

On February 16, 1971 the Plaintiff, Newburger, Loeb & Co., Inc. (hereinafter sometimes referred to as the "Corporation") as assignee, commenced the instant action against Defendants Charles Gross ("Gross"), Mabel Bleich ("Bleich"), and Gross & Co., by filing and serving a summons and complaint. The complaint alleged in substance that Gross & Co. and its partners Gross and Bleich had "churned" the account of Buckley (the assignor of the claim).

On or about May 3, 1971 Defendants filed their initial answer and counterclaims. The counterclaims basically charged that the Defendants' assets in Newburger, Loeb & Co., had been converted. The answer added Jeanne Donoghue ("Donoghue") as an Additional Counterclaimant. It also added 16 parties as "Additional Defendants on Counterclaims," namely, Newburger, Loeb & Co. (hereinafter sometimes referred to as the "Partnership"); Andrew M. Newburger; Robert L. Newburger; Leo Stern; Robert L. Stern; Richard S. Stern; John F. Settel; Harold J. Richards; Sanford Roggenburg; Adolphus Roggenburg; Ned D. Frank; Fred Kayne and Charles

Sloane (partners in Newburger, Loeb & Co. at various times during 1970); Robert Muh and Paul Risher (Risher, Muh & Co., Inc. was the Management Consultant firm for the Partnership during the last six months of 1970); and Alex Aixala (an investor in the Corporation having no contact with the partnership).

On February 28, 1972 an amended answer with counterclaims was filed. The amended answer, substantially identical with the original answer, and containing eight counterclaims, added the law firm of Finley, Kumble, Underberg, Persky and Roth ("Finley Kumble"), Robert S. Persky (a partner in the said law firm) and Lawrence J. Berkowitz (inside house counsel for Newburger, Loeb & Co. and Newburger Loeb & Co., Inc.) as Additional Defendants on the Counterclaim. (Hereinafter, all Additional Defendants on the Counterclaims are sometimes referred to collectively as "Counterclaim Defendants.")

On April 19, 1972, Defendants Andrew M. Newburger; Robert M. Newburger; Leo Stern; Robert L. Stern; Richard D. Stern; John F. Settel; Harold J. Richards; Sanford Roggenburg; Adolphus Roggenburg; and Ned D. Frank moved for an order

dismissing the counterclaims on various grounds. On the same date, April 19, 1972, Plaintiff and other Additional Defendants on Counterclaim also moved to dismiss the counterclaims on various grounds. On May 26, 1972, the Gross Defendants moved for summary judgment on their behalf. On June 28, 1972 Alex Aixala moved for summary judgment on his behalf.

These various pretrial motions were decided by Judge Ward in an opinion dated October 16, 1973.[3/] In that opinion Judge Ward held that the Complaint presented triable issues of fact, and that the Third, Fifth, Sixth, Seventh and Eighth Counterclaims of the Defendants could be maintained only as setoffs. Judge Ward found as a matter of law that a certain transfer of assets from Newburger, Loeb & Co., to Newburger Loeb & Co., Inc. on February 11, 1971 violated Section 98 of the New York Partnership Law resulting in damages to Gross, Bleich and Donoghue. The case was set down for trial on the issue of damages.

On June 16, 1975, a jury trial of the issues was commenced. Richard Owen, District Judge for the Southern District of New York presided over the trial.

3/ Newburger, Loeb & Co., Inc. v. Gross, supra.

After 3 weeks of trial, and by consent of all parties, the jury was withdrawn and the case proceeded as a bench trial. The factual presentation was completed on August 1, 1975. The case against Alex Aixala was dismissed at the close of the Defendant's proof. On July 7, 1976, Judge Owen rendered his Opinion and Order in which he found the Plaintiff and the Counterclaim Defendants (except Lawrence J. Berkowitz) to be liable to Defendants as follows:[4/]

1. The Plaintiff and the Counterclaim Defendants including Sloane were found jointly and severally liable to Gross for the wrongful conversion of his capital contribution of $337,921 plus interest from February 11, 1971.

2. The Plaintiff and the Counterclaim Defendants including Sloane were found jointly and severally liable to Bleich for the wrongful conversion of her capital contribution of $76,868.75 plus interest from February 11, 1971.

3. The Plaintiff and the Counterclaim Defendants including Sloane were found jointly and severally liable to Donoghue for the wrongful conversion of her capital contribution of $76,868.75 plus interest from February 11, 1971.

4/ The judgment, as originally signed by Judge Owen, inadvertently held Sloane and Muh liable for damages delineated in paragraphs 4 and 5 below also. But in a Memorandum and Order dated November 17, 1976 this mistake was corrected by Judge Owen. Paragraphs 4 and 5 below reflect the deletion.

4. Kayne, Risher, Newburger Loeb & Co., Inc., Persky and Finley Kumble were found jointly and severally liable to Gross for the conversion of Gross' "in kind" securities of $58,000 plus interest, and $75,803 plus interest.

5. Kayne, Risher, Newburger Loeb & Co., Inc., Persky, and Finley Kumble, were found jointly and severally liable to Gross in the sum of $50,000 as punitive damages.

6. All the remaining claims of the parties were dismissed.

Notice of Appeal was timely filed.

This Brief is filed on behalf of Appellant Charles Sloane.

This Brief limits itself to the legal point stated in the "Statement of Issues Presented for Review." Other reviewable legal points such as the jurisdiction of the Court to handle the counterclaims, the finding that Section 98 was violated, the rights of Gross as against Sloane assuming a violation of the rights of Bleich and Donoghue under Section 98, the amount and calculation of damages, the existence of a conspiracy, multiple conspiracies, the liability of clients who rely upon advice of counsel, etc.,

are not briefed herein, but are argued in co-Appellants briefs on appeal. Pursuant to F.R.A.P. 28, Appellant Sloane adopts by reference those arguments where applicable as if fully set forth herein.

C. STATEMENT OF THE FACTS

From 1962 to 1966, the partnership of Gross & Co., was a stock brokerage house and David Buckley, a customer of Gross & Co., had an active brokerage account therein (A 756-797).[5/] Newburger, Loeb & Co., another stock brokerage house at the time, executed orders for Gross & Co., and sent confirmations and statements to Gross & Co. customers including Buckley. (2294) Buckley had no other contacts with Newburger Loeb & Co. Gross, Bleich and Donoghue defendants-appellees herein were partners in Gross & Co., but none of them was a partner in Newburger Loeb at that time. Bleich was Gross' secretary at Gross & Co. and Donoghue is Gross' sister. Buckley eventually charged that Gross & Co., had churned his account and this churning claim was later assigned to Newburger Loeb & Co., Inc.[6/] and is the basis for plaintiff's cause of action herein. (566-633)

In 1969 Gross & Co. liquidated. Gross then became a general partner in Newburger, Loeb & Co. and Bleich and Donoghue became limited partners therein. (2292-3, 4365, E-156)

5/ Appendix pages will be given hereinafter in parenthesis without additional designation.

6/ Other facts relevant to that claim are not relevant to Sloane's issues on appeal and accordingly are not set forth herein.

From July, 1969 to August 1970, Gross also held the position of managing partner of the Partnership. (2305) Towards the end of his tenure the Partnership suffered substantial continuing operating losses. (3409,E-203) In August, 1970 the other general partners ousted Gross as managing partner and installed Fred Kayne. In August, 1970 Gross submitted his resignation as general partner effective as of October 1, 1970. (2324) Defendants Donoghue and Bleich followed suit and each of them gave notice of withdrawal on December 31, 1970 effective immediately. (1645) According to the operative Partnership agreement, The Restated Articles of Limited Partnership As Amended ("Restated Articles") dated February 26, 1970 and expiring by its terms on December 31, 1971, Gross' capital was to be distributed to him on September 30, 1971. The two women, on the other hand retained rights as limited partners even after withdrawal. (E-412)

Kayne too ran into difficulties in saving the firm and he resigned as general partner of the firm on November 1, 1970, effective November 30, 1970. He returned to California staying in the Company as a registered representative

only. (1956-7)

During the period of Kayne's stewardship, he brought in a business consulting firm by the name of Risher, Muh & Co., Inc. (2317). Paul Risher and Robert Muh began advising the Partnership in the summer of 1970 and continued to do so until the Corporation was formed and the Partnership transferred most of its assets and liabilities to the Corporation pursuant to a Transfer Agreement signed on February 11, 1971. In 1970 the Partnership had retained the law firm of Finley Kumble (1078). Robert Persky, Esq., was one of the responsible attorneys handling the Partnership's matters.

Appellant Sloane was a registered representative with Mc Donnell & Co. in California until October, 1969 when he joined Newburger Loeb & Co. as a registered representative in forming their new California office. (3702,3) In February, 1970 upon the entreaties and inducements of Gross and others, Sloane became a general partner of the Partnership paying $50,000 for 2% of the assets. (3704) In October, 1970 Sloane resigned from the Partnership effective November, 1970 (3706). From then until February 11, 1971 Sloane

remained in California as a registered representative and local office manager of Newburger, Loeb & Co. (3708)

Beginning in the summer of 1970 the New York Stock Exchange recognized the financial difficulties in which the Partnership found itself and required that the Partnership strengthen its capital position by a substantial infusion of new capital or merge with another member firm. The alternative presented by the New York Stock Exchange was immediate suspension of the Partnership as a member firm which also would have entailed its dissolution.

Repeated attempts by various members of the Partnership during the last months of 1970 to gain additional capital or merge with a satisfactory member firm were totally unsuccessful. In the meantime the Exchange was induced to grant limited extensions with respect to ordering suspension. On November 17, 1970 the New York Stock Exchange wrote the Partnership a strong letter stating in pertinent part:

> "Under the circumstances, and in view of your impaired capital position and lost trend this Department is left with no alternative but to approach the Board of Governors and ask for your suspension under Article XIII of the Exchange's Constitution if your 'Required Excess Capital' is

not met by the close of business on November 20, 1970. A signed merger agreement filed with this Department by the close of business on November 29, 1970 will be acceptable in lieu of the Required Excess Capital."

"In the meantime you are directed to take every possible anticipatory step to prepare for possible liquidation of your firm such as discontinuing any purchases for your firm, trading in investment accounts, liquidating proprietary positions, and other administrative procedures in the event of a suspension by the Board of Governors." (644-5,E1-2)

Through the good offices of Persky, Alex Aixala, Additional Defendant on Counterclaim, agreed to invest $1,000,000 under a plan by which the Partnership would be reformed into a corporation. (2696-2698, 2713) The NYSE was informed of the ensuing discussions but further pressures were placed on the Partnership to conclude the negotiations when the New York Stock Exchange again wrote in a Memorandum:

"I informed Mr. Simpkin that the firm had been advised to proceed with an orderly liquidation... that if that was not accomplished, the staff would recommend suspension...when the current agreements expire on January 25, 1971." (E-229)

The negotiations towards reformation were buffeted by the conflicting position of the various important parties. The subordinated lenders, limited partners and general partners each had an economic stake to protect. Acting in their behalf were Risher and Muh who simultaneously were managing the Partnership and promoting the new Corporation on behalf of the Partnership. Gross, Kayne and Sloane as withdrawn General Partners had no formal rights with the Partnership except that each questioned the ability of the Partnership to repay the withdrawn general partners' capital contribution. Kayne was in favor of the reorganization. Sloane first discovered in December, 1970 that negotiations were in progress to reform into a corporation and he asked to be included. (3719) Almost everyone saw it as a vehicle to save their own sizeable investments.

Gross on the other hand was opposed to the Corporation. Bleich and Donoghue as withdrawn limited partners still retained their voting rights as limited partners but were undecided on the feasibility of the new Corporation until February 11, 1971 when they finally declined to consent to the transfer of assets. (1142-3) Berkowitz, Muh and Risher also became shareholders by paying for their securities something in excess of book value. (2855, 3296)

Berkowitz testified that he, as house counsel to the Partnership, sent a letter to the SEC telling them of the reorganization and of the fact that Gross, Bleich and Donoghue would not be signatores. The SEC approved the transactions nonetheless, but insisted that the new corporation set up a reserve fund of $300,000 to take care of the contingent liability to the three as might be required. (4860) In fact, such a reserve fund was set up and the capital of the corporation never dipped below a figure which would have impaired that reserve fund at least until the withdrawal by Sloane from the corporation on February 11, 1972.

After many negotiating sessions, compromises were reached on the issues which had bogged down the closing: to wit, waiver of certain potential law suits, forgiveness of negative capital position of general partners, assignment of tax rebates, valuation of the new stock and other securities and valuation of the existing partnership assets of each insider. Sloane was singularly uninvolved in these sessions.

The original plan of reorganization envisioned Risher and Muh as the operating management of the Corporation but the N.Y.S.E. rejected the proposal because Risher and Muh were too inexperienced. Later Kayne and Sloane's names were offered as additional management and this was

approved. (2777-9, 2875) (In fact Sloane's name was submitted to the N.Y.S.E. originally without his knowledge or permission. He later approved the submission.) Finally, the plan was formalized and everyone was offered the debt and equity securities. as per the negotiations. Everyone in all these groups purchased the securities except for Gross, Bleich and Donoghue, who declined.

One of the formalistic conditions that obtained at the closing of February 11, 1971 was the issuance of an opinion letter by the law firm of Rosenman, Colin, Freund, Lewis and Cohen ("Rosenman Colin"), which at that time represented the Partnership. That letter should have stated that the transfer was not in violation of any existing law. At the closing everyone present knew that Gross, Bleich and Donoghue were not going to sign the Agreement. However, everyone was also of the opinion that Gross' signature on the Transfer Agreement was not required by law.

Prior to the closing Rosenman Colin had advised Persky and others, but not Sloane, that if Bleich and Donoghue should decline to consent to the transfer, they would not issue an opinion letter at the closing. (2128-9) When the closing finally did take place, Mr. Burak appeared for the Rosenman Colin firm and formally declined to issue the letter. While there is some dispute in the testimony as to whether

Robert Persky volunteered to act as special counsel for the Partnership thereafter, or was asked to do so by the parties and attorneys present, it is clear that Persky eventually did act as special counsel to the Partnership in lieu of Rosenman Colin and issued an opinion letter stating that the Transfer Agreement was legal even without Bleich and Donoghue's signatures.

At that closing which was held at the offices of Finley Kumble at 477 Madison Avenue, New York, New York, from 2:30 P.M. until late into the next morning, there were present Fred Kayne; Robert Muh; Paul Risher; Charles Sloane; Lawrence Berkowitz; Robert Persky, and two other members of the firm of Finley Kumble (Michael Bamburger and Donald Snider); Andrew and Robert Newburger; Robert Stern; H. Paul Burak of Rosenman Colin; and fifteen others, namely:

David Abrams, Esq. (Richenthal Abrams & Moss)

Andrew P. Davis, Esq. (Davis & Davis)

Albert Dworkin

Ned D. Frank, Esq.

Thomas A. Hopkins, Esq. (White & Case)

Allen Isaacson, Esq. (Strasser, Spiegelberg, Fried & Franks)

Burton Lehman, Esq.

George B. Levy, Esq. (Silbefeld & Danziger)

Charles E. Lewis, Esq. (Wilkie, Farr)

Donald L. Newburg, Esq.

Stephen Ross, Esq.

Robert A. Steefel, Esq. (Stroock, Stroock & Lavan)

Richard M. Ticktin, Esq. (Ticktin & Malkin)

Ronald S. Tauber, Esq. and

Louis Zimmerman, Esq. (638, 728-730, 1639-40, 2353, 4293-95)

During the weeks and months prior to the closing appellant Sloane did not come to New York. Nor did he attend any meetings concerning the Gross, Bleich and Donoghue netogiations. He flew into New York the night before the closing, stayed for the closing, and returned to California the next day. It was at the closing itself that Sloane first heard that the absence of Bleich and Donoghue's signatures could have legal ramifications. He of course was aware that these people might not sign but he viewed this as an economic problem -- one which would cause economic problems later if at all. He and Kayne had threatened to sue Gross for fraud in the sale of the partnership interests to them. When Gross, Bleich and Donoghue didn't sign, he and

Kayne did sue. That suit charged that Gross fraudulently induced them into becoming partners in the Partnership. Gross prevailed in this suit which wound up in arbitration before the NYSE. It became the longest arbitration in the history of the New York Stock Exchange.

At the closing, when Mr. Burak from the Rosenman Colin firm officially declined to issue the opinion letter, all the attorneys discussed openly the alternatives. (2225-6) It was eventually decided that Persky would act as the special counsel for the Partnership and draft an opinion letter. The attorneys also discussed the possibility of closing without any opinion at all but that was rejected. All the attorneys present permitted their clients to sign the Transfer Agreement after reading Persky's opinion letter and discussing the same with their clients. (3288) Sloane also signed, however, he did so without benefit of his attorney's opinion since he was not represented by any one at that meeting. He had no idea, nor could he that the transfer violated Section 98 of the New York State Partnership Law. He did what all 16 of the lawyers present advised their clients to do. Sign.

D. ARGUMENT

Sloane did not knowingly enter a conspiracy to violate Section 98 of the New York Partnership Law.

Judge Owen held Sloane liable to Gross, Bleich and Donoghue solely on the theory that Sloane and others conspired to and did wrongfully convert the capital of Gross, Bleich and Donoghue by transferring all the assets and liabilities from Newburger Loeb & Co. to Newburger Loeb & Co., Inc. on February 11, 1971.

The tort of conversion, if committed at all, was committed at that moment when the general partners transferred the assets and liabilities of the Partnership to the Corporation. Sloane at the time of the transfer was merely a promoter of the new corporation. He signed the Transfer Agreement as a consenting party but not as a partner in Newburger Loeb & Co. Likewise he did not sign for the Corporation as did Risher. As to the old Partnership, he stood in the exact same position as did Gross -- a

withdrawn general partner. Thus Sloane was neither the transferor nor the transferee of the converted assets of the Partnership. Rather he was, at worst, an aider and abettor of the transfer. His liability thus is derivative and can exist only if he could be found to be a knowing conspirator whose intent was to aid in the transfer which he knew to be wrongful.

There is no separate recognized cause of action for civil conspiracy in New York and such allegations serve only to connect Sloane with the acts of his alleged coconspirators. Friedlander v. National Broadcasting, 39 Misc. 2d 612, 615 (Sup. Ct. 1963); Cuker Inc. v. Crow Constr. Co., 6 App. Div. 2d 415, 417, (1st Dept. 1958); Leshay v. Tomashoff, 267 App. Div. 635 (1st Dept.), aff'd, 293 N.Y. 797 (1944) The law in New York is that the parties who directly convert the victim's goods are liable absolutely, however the aiders and abettors of that tort are liable as coconspirators

only if they knowingly assisted in the commission of the tort. 89 C.J.S. Trover and Conversion Section 118 (1955), 10 N.Y. Jur. Conversion Section 43 (1960). Analogously, in criminal law a defendant cannot be convicted as a conspirator nor as an aider and abettor merely by showing that he furthered the conspiracy even through the commission of unlawful acts. Ingram v. United States, 360 U.S. 672, 678 (1959); United States v. Aviles, 274 F.2d 179, 190 (2d Cir.), cert. denied, 362 U.S. 974 (1960). Nor is the showing of association alone enough to establish a conspiracy. United States v. Vilhotti, 452 F.2d 1186, 1189-90 (2nd Cir. 1971), cert. denied, 405 U.S. 1041, 406 U.S. 947 (1972). In fact if Sloane executed the Transfer Agreement in the good faith belief, however erroneous, that the signatures of Gross, Bleich or Donoghue were not necessary, or that the Agreement was otherwise lawful then Sloane is not liable to any one of them. Steiger v. United States, 373 F.2d 133 (10th Cir. 1967).

This principle of law was also recognized tacitly by the Court where in its opinion on page 24 it stated: "Also, similarly, by causing the transfer to take place in knowing violation of Section 98, the members of the new team are individually liable for this damage." (Emphasis supplied.)

By converse reasoning, if the opposite were true, that is that all parties who assisted in the transfer were liable in conversion independent of their knowledge of its legality, then all the signatores to the Transfer Agreement -- limited partners, general partners, promoters, subordinated lenders, Alex Aixala, (new corporate investor) and Lawrence Berkowitz (appeared at closing for the Corporation) as well as all 15 of the attorneys present at the closing who counseled their clients -- likewise should have been joined in this suit and held liable jointly and severally with the general partners and the Corporation. In fact, the Gross defendants never joined the limited partners, the subordinated lenders nor the other attorneys as defendants in the instant litigation. Even more to the point, Aixala represented by Persky and Berkowitz (present at the closing for the Corporation) were found not liable by Judge Owen.

The proof in the case at bar is insufficient as a matter of law to support the trial court's finding of fact that Sloane knew the transfer on February 11, 1971 was wrongful as to Gross, Bleich or Donoghue. As to Gross, the evidence is overwhelming that all the parties and the attorneys believed that Gross did not have the right to prevent the transfer. No one ever thought that Gross' signature was legally required on the Transfer Agreement. The conversations concerning the signatures which might be necessary always centered on the names of Bleich and Donoghue to the exclusion of Gross. Even Burak believed Gross' signature was unnecessary. Therefore as to Gross, there is no proof that Sloane knew he was aiding or abetting a wrongful transfer.

The same is true as to Bleich and Donoghue also but not as obvious. The transfer had originally been conditioned upon the issuance by the Rosenman Colin firm of an opinion letter stating that in their opinion the transfer was legal. Although there is some evidence that prior to the transfer, Rosenman Colin firm notified Persky and some of the counterclaim defendants and their counsel that they would not issue the opinion letter unless Bleich and Donoghue

executed the Transfer Agreement, the evidence is clear that Sloane was not so notified prior to the day of closing. He had been busy working in California and flew into New York only to execute the necessary documentation.

The uncontroverted testimony of all the witnesses at trial including (a) Burak from Rosenman Colin; (b) Persky, Snider and Bamburger from Finley Kumble; (c) Sloane; (d) the other counterclaim defendants; (e) all the attorneys present at the closing who also testified at trial; (f) David Abrams, Robert Steefel and (g) others, was that Rosenman Colin's failure to issue an opinion was based on their inability to find precedential case law under Section 98 applicable to the circumstances of the Newburger Loeb transfer. The testimony is also uncontroverted that all the attorneys at the closing including Burak thought the Transfer Agreement was permissible. The real issue therefore was not the substance of an opinion but who among them was knowledgeable enough to be able to give an acceptable opinion.

When Burak declined to give the opinion, all the attorneys openly discussed the problem. Sloane was not represented at the closing but relied on the tenor

of the open discussion. There was even a discussion of dispensing with the opinion letter altogether by the simple expedient of waiving the necessity. Finally it was decided by all parties present that Persky would render the opinion letter. A break in the proceedings followed while Persky drafted the letter and then the activity resumed when the letter was passed around to all attorneys. Each discussed the letter with his clients and every party thereafter signed the Transfer Agreement including Burak's client. Sloane also signed.

The direct proof shows unequivically that the attorneys and clients believed the agreement to be legal despite the absence of Bleich and Donoghue's signatures. Nor does there exist circumstantial evidence that Sloane knew that the Persky letter was fraudulent or that the transfer was otherwise wrongful. Such knowledge might legally be imputed to Sloane but if and only if one could infer logically from the testimony, that during the discussions at the closing Sloane was informed that the letter was fraudulent and the transfer wrongful. Such a logical inference can never be drawn from the unanimous denial of such a discussion. The absence of even a scintilla of

evidence in this regard cannot be supplied by a reliance upon surmise and suspicion. Proof of scienter or knowledge of a fact cannot be inferred, it must be proved Anderson v. Molley, 191 App. Div. 573 (1st Dept. 1920); it cannot be based on mere suspicion, conjecture or doubtful interference Dhooge Bros. Inc. v. Mecho, 15 App. Div. 2d 774 (1st Dept. 1962). See also Lowendahl v. B&O Railroad Co., 247 App. Div. 144 (1st Dept.), aff'd, 272 N.Y. 360 (1936) and Tittering Ton v. Colvin, 270 N.Y. 321 (1936). As was said in Lynch v. Gibson, 254 App. Div. 47 (1st Dept.), aff'd, 279 N.Y. 634 (1938), "Fraudulent acts will not be presumed nor can they be based merely on suspicion, conjecture or doubtful inference."

In the absence of any direct, or sufficient circumstantial proof of Sloane's knowledge of the wrongfulness of the transfer, it cannot be inferred that Sloane knew he was committing a wrong when he signed the Transfer Agreement. Therefore the lower court erred in finding Sloane liable to Gross, Bleich and Donoghue for "causing the transfer to take place in knowing violation of Section 98."

E. CONCLUSIONS

The lower court erred in finding Sloane liable to Gross, Bleich and Donoghue because as a matter of law the proof was insufficient to support a finding that he "knowingly" conspired to convert the capital assets of Gross, Bleich and Donoghue. Sloane respectfully prays that the judgment below be modified by striking his name therefrom and by dismissing the counterclaims as to him.

DATED: New York, New York
February 4, 1977

Respectfully submitted,

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Of Counsel:

LEON BAER BORSTEIN, ESQ.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th Rd. MASPETH, NYC.

That on the 4th day of FEBRUARY, 1977, deponent personally served the within BRIEF OF ADDITIONAL DEFENDANT ON COUNTERCLAIMS APPELLANT-CROSS-APPELLEE CHARLES SLOANE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

(PLEASE SEE ATTACHED LIST)

Robert La Grassa

Sworn to before me this

4th day of FEBRUARY, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

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